Mastiara Sdn Bhd v Motorcycle Industries (M) Sdn Bhd & Ors

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO P-02-790 OF 1997
SHAIK DAUD, ABDUL MALEK AHMAD AND DENIS ONG JJCA
22 OCTOBER 1998

***Contract** — Sale and purchase of land — Deposit, forfeiture of — Whether purchaser was ready and willing to complete the sale*

By an agreement dated 15 June 1979 between the plaintiff ('the appellant') and the first defendant ('the first respondent'), it was agreed that the first respondent would sell and the appellant would purchase a piece of land in Penang together with the buildings erected on it ('the properties'). Pursuant to the agreement, the appellant paid the deposit of the purchase price to the first respondent and on 10 August 1979, the balance was paid. However, the first respondent could not deliver a valid and registrable title to the appellant and the balance of the purchase price was refunded. Subsequently, the appellant had asked for specific performance of the agreement, alternatively damages for breach of contract or damages in lieu of specific performance and a declaration that the appellant was entitled to a lien on the properties for the deposit with interest thereon. In their defence, the respondents pleaded that the first respondent was a company in receivership and that prior to 23 February 1987, the second and third respondents had no power to sell or transfer the properties. By a letter dated 23 February 1987, the respondents informed the appellant that they were in a position to obtain and deliver to the appellant an executed memorandum of transfer and required the appellant to forward the balance of the purchase price. The appellant did not respond. On 3 April 1987, another letter was sent to the appellant requesting a reply within seven days failing which the respondents would forfeit the deposit and terminate the agreement. The appellant again did not respond. The respondents contended that because of the failure, the appellant was not entitled to the reliefs prayed for. In the High Court, the learned trial judge agreed with this contention. The issue in the appeal was whether the appellant was ready and willing to perform the obligation under the sale and purchase agreement.

Held, dismissing the appeal with costs:

The respondents were ready to give specific performance on 23 February 1987 and the appellant could have completed the sale and continue with the claim for damages for late delivery. All the appellant should have done was to pay the balance of the purchase price. However, the appellant chose not to respond (see p 689D). In the circumstances, the appellant was at fault for not responding to the respondents' letters dated 23 February 1987 and 3 April 1987 and it

was quite right for the learned trial judge to dismiss the claims and to forfeit the deposit (see p 690I). A

[**Bahasa Malaysia summary**

Melalui satu perjanjian bertarikh 15 Jun 1979 di antara plaintif ('perayu') dengan defendan pertama ('penentang pertama'), adalah telah dipersetujui bahawa penentang pertama akan menjual dan perayu akan membeli sebidang tanah di Pulau Pinang bersama dengan bangunan-bangunan yang telah didirikan di atasnya ('harta-harta tersebut'). Memenuhi perjanjian tersebut, perayu telah membayar deposit harga belian tersebut kepada penentang pertama dan seterusnya pada 10 Ogos 1979, perayu telah membayar baki harga belian tersebut. Bagaimanapun, penentang pertama tidak dapat menyampaikan kepada perayu satu hakmilik yang sah dan boleh didaftarkan dan baki harga belian tersebut telah dikembalikan. Seterusnya, perayu telah meminta perlaksanaan spesifik perjanjian tersebut, secara alternatif ganti rugi bagi perlanggaran perjanjian tersebut atau gantirugi sebagai ganti perlaksanaan spesifik dan perisytiharan bahawa perayu berhak untuk lien ke atas harta-harta tersebut bagi deposit dengan faedahnya. Di dalam pembelaan mereka, penentang-penentang telah memplid bahawa penentang pertama adalah satu syarikat di dalam kuasa penerima dan bahawa sebelum 23 Februari 1987, penentang kedua dan ketiga tidak mempunyai kuasa untuk menjual atau memindahmilik harta-harta tersebut. Melalui surat bertarikh 23 Februari 1987, penentang-penentang telah memaklumkan kepada perayu bahawa mereka telah boleh mendapatkan dan menghantar kepada perayu satu memorandum perlaksanaan pindahmilik dan memerlukan perayu membayar baki harga belian tersebut. Perayu tidak memberi jawapan. Pada 3 April 1987, sepucuk lagi surat telah dihantar kepada perayu memintanya membalas dalam masa tujuh hari yang mana jika gagal berbuat demikian, penentang-penentang akan melucuthak deposit tersebut dan membatalkan perjanjian. Tiada jawapan dari perayu dan oleh itu adalah hujah penentang-penentang bahawa akibat kegagalan tersebut, perayu tidak berhak mendapat relief yang dipohon. Di dalam Mahkamah Tinggi, hakim yang bijaksana telah bersetuju dengan hujah tersebut. Isu di dalam rayuan adalah sama ada perayu telah bersedia dan berkemahuan untuk menunaikan tanggung jawab di bawah perjanjian jual beli tersebut. B C D E F G H

Diputuskan, menolak rayuan dengan kos:

Penentang-penentang telah bersedia untuk memberikan perlaksanaan spesifik pada 23 Februari 1987 dan perayu boleh melengkapkan jualan tersebut dan meneruskan tuntutan ganti rugi bagi penyerahan lewat. Apa yang perayu perlu buat adalah membayar baki harga belian. Tetapi, perayu telah memilih untuk tidak memberikan jawapan (lihat ms 689D). Di dalam keadaan sedemikian, perayu telah I

tersilap apabila tidak menjawab surat-surat penentang-penentang bertarikh 23 Februari 1987 dan 3 April 1987 dan adalah betul bagi hakim yang bijaksana untuk menolak tuntutan dan melucuthak deposit tersebut (lihat ms 690I).]

Notes

For a case on forfeiture of deposit in sale and purchase of land, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) para 2083.

Cases referred to

Ganam d/o Rajamany v Somoo s/o Sinnah [1984] 2 MLJ 290 (refd)

Kimlin Housing Development Sdn Bhd (Appointed receivers and managers) (in liq) v Bank Bumiputra (M) Bhd [1997] 2 MLJ 805 (refd)

Appeal from: Civil Suit No 22–29 of 1982 (High Court, Pulau Pinang)

Murali Navaratnam (*Ghazi & Lim*) for the appellant.

Zaki Tun Azmi (*J Doshi* and *S Thomas* with him) (*Abdullah & Zainuddin*) for the respondents.

Abdul Malek Ahmad JCA (delivering the judgment of the court): According to the statement of claim dated 13 January 1982, by an agreement dated 15 June 1979 between the plaintiff, the appellant before us, a private limited company having its place of business in Alor Setar, Kedah, and the first defendant, the first respondent in this appeal, a company running its business in Kuala Lumpur, it had been agreed by the third respondent that the first respondent would sell, and the appellant would purchase, the lands held under Pegangan 536, 537 and 538 respectively in Bandar Jelutong, Section 1, Daerah Timor Laut, Penang together with the three shophouses erected respectively thereon known as Nos 411A, 411B and 411C Jalan Jelutong Penang for RM510,000. The second and third defendants, now the second and third respondents, are receivers and managers of the first respondent.

Under the agreement, the appellant was to pay a deposit of RM51,000 to the first respondent, which they did, and that the balance of RM459,000 was to be paid to the first respondent's solicitors on or before the date of completion which was 14 August 1979 upon which the first respondent was to deliver to the appellant a valid and registrable memorandum of transfer of the said properties free from all encumbrances together with the documents of title thereto. Time was to be the essence of the agreement.

On 10 August 1979, the appellant forwarded to the first respondent's solicitors a cheque for RM459,000 being the balance of the purchase price. However, on 28 September 1979, the third respondent verbally informed the appellant that the directors of the first respondent had refused to execute the transfer and as a result they were returning the balance of the

purchase price to the appellant's solicitors to hold the same until the transfer had been duly executed. A

Consequently, the appellant had asked for specific performance of the agreement, alternatively damages for breach of contract or, in the alternative, damages in lieu of specific performance and a declaration that the appellant is entitled to a lien on the properties for the deposit with interest thereon. B

In their statement of defence amended pursuant to a court order dated 5 December 1997, the respondents pleaded that the first respondent is a company in receivership. Further, the second and third respondents had been conferred the power and authority to sell the assets and the property of the first respondent under the debenture issued by the first respondent on 25 January 1977 but state that actually in law the third respondent had no power to sell the assets. C

The first respondent also admitted having received a deposit of RM51,000 and although they had told the appellant that it would be refunded, the appellant had informed the respondents that they will not accept a refund. The balance of the purchase price amounting to RM459,000, however, had been refunded. D

The respondents now contend that no valid and registrable memorandum of transfer had been forwarded as the respondents have no power to sell or transfer the properties. They had taken all reasonable measures to secure the execution by the directors of the first respondent of the transfer of the properties but they had failed or neglected to do so. E

Subsequently, by a letter dated 23 February 1987, the respondents had through their solicitors informed the solicitors for the appellant that the respondents were in a position to obtain and deliver to the appellant an executed memorandum of transfer and required the appellant to forward the balance of the purchase price amounting to RM459,000. F

There was no response from the appellant. By a letter dated 3 April 1987, the solicitors for the respondents had written to the solicitors for the appellant requesting a reply within seven days failing which the respondents would forfeit the deposit and terminate the agreement. G

Again, there was no response from the appellant. It is therefore the respondents' contention that because of the failure to respond, the appellant is not entitled to the reliefs prayed for.

Before us, learned counsel for the appellant submitted that there were actually only two issues to be considered. The first was whether the receivers and managers had the power to sell in view of the Supreme Court decision in *Kimlin Housing Development Sdn Bhd (Appointed receiver and Manager) (In liquidation) v Bank Bumiputra (M) Bhd & Ors* [1997] 2 MLJ 805 where it was decided, among other things, that the provisions of the National Land Code setting out the rights and remedies of parties under a statutory charge over land comprised in Part XVI of the Code are exhaustive and exclusive and any attempt at contracting out of those rights, unless expressly provided for in the Code, would be void as being contrary H I

to public policy. The court, therefore, held that the receivers and managers were not entitled to sell the charged lands by virtue of the powers conferred upon them by the debenture without taking proceedings under the Code to obtain a judicial sale.

On this point, the learned trial judge had this to say:

> I must say that very clear and learned submission have been forwarded by learned counsel for both sides which makes it easier for me to decide.
>
> Briefly, the submission of the learned counsel for the plaintiff is that *Kimlin*'s case does not apply to the instant case because in *Kimlin*'s the charges are legal or statutory charges whereas in this case the charge is an equitable charge.
>
> So, the first question which I have to decide is whether our law recognises equitable charges. It appears to me that this point is settled. All I have to do is to refer to the case of *Mahadevan & Anor v Manilal & Sons (M) Sdn Bhd* [1984] 1 MLJ 266, a decision of the Federal Court which is binding on this court. In that case, it was held, inter alia, that there was no provision in the National Land Code prohibiting the creation of equitable charges or liens. Therefore equitable charges and liens are permissible under our land law. See also *Malayan Banking Bhd v Zahari bin Ahmad* [1988] 2 MLJ 135.

Then, after referring to the finding in *Kimlin*'s case, he made the following observation:

> What does this mean? Does it mean that all dealings in land or involving land can only be done as provided by the National Land Code and no others? I do not think that that is what the judgment means. I so say because, it is now well-established that 'jual janji' and bare trustee concept, to name only two, are recognized by our courts, even though they are clearly not provided by the Code.
>
> Further more, the charges in question in *Kimlin*'s case were registered under the National Land Code. Therefore, in my humble opinion, the better view is that, in view of the decision of the Federal Court in *Mahadevan*'s case, what was said in *Kimlin*'s case should be confined to charges registered under the Code. In other words, if a charge is registered under the Code, the remedy must be in accordance with the Code. If the charge is an equitable charge, outside the Code, the Code does not apply and chargee may enforce the remedy provided in the debenture. Otherwise, there would be a lacuna. The law (courts) recognizes equitable charges but no remedy is available.
>
> For these reasons, I agree with the submission of learned counsel for the plaintiff, that *Kimlin*'s case does not apply to the present case, the charge here being an equitable charge, and therefore the receivers and managers have power, which was given by the debenture, to sell the said properties.

Learned counsel for the appellant explained that they had included this ground in the memorandum of appeal before the judgment was released but since the learned trial judge found in their favour as regards this issue, he was abandoning the point. And since learned counsel for the respondents did not touch on this issue despite being the party that raised it, we will not deal with it. In fact, it was our finding that the issue was of no relevance in the first place.

The second issue is whether the appellant was ready and willing to perform the obligation under the sale and purchase agreement. The relevant

agreement was entered into on 15 June 1979 between the appellant and the first respondent. RM51,000 equivalent to ten per cent of the contract price was paid on 26 May 1979.

Clause 3 of the agreement stipulated that the completion date was on 14 August 1979 but four days earlier, on 10 August 1979, the appellant had paid the balance of the purchase price amounting to RM459,000.

The first respondent, however, could not deliver a valid and registrable title to the appellant as they could not get the directors to execute the transfer. On 28 September 1979, the then solicitors for the appellant wrote the following letter:

28 September 1979

Express AR Registered

Dear Sirs,

Grant (First Grade) Nos 3482, 3483 & 3484 Lot Nos 536, 537 & 538 Section 1 Bandar Jelutong NED Penang together with the respective shophouses thereon No 411-A, 411-B & 411-C Jelutong Road, Penang

We refer to the telephone conversation between your En Abdullah bin Mohd Yusof and our Mr CS Chan this afternoon.

The Receiver and Manager of Motorcycle Industries (M) Sdn Bhd, Mr Leong Siew Wing has informed our clients this afternoon in his office in Penang that the directors of the company have refused to execute the memorandum of transfer in favour of our clients, and that efforts are still being made to persuade the directors to execute the transfer. As we have already paid the purchase price in full your clients are therefore in breach of the sale agreement dated 15 June 1979. Furthermore the properties are encumbered by a private caveat in favour of Yamaha Motor Co Ltd.

Mr Leong was also unable to give our clients any indication as to when the transfer could be executed and delivered to us. In these circumstances our clients are compelled to request you to return the balance purchase price of $459,000 to us *immediately* for us to hold until the transfer has been duly executed in their favour whereupon we shall forward the said sum to you.

Kindly therefore let us have the said sum as a matter of urgency. Please note that this request is made strictly without prejudice to our client's rights under the Sale Agreement, including the right to have the sale completed.

Yours faithfully,

(Sgd)

M/s Tunku Zuhri, Manan & Abdullah,
Advocates & Solicitors,
Kuala Lumpur
cc: M/s Mastiara Sdn Bhd

The balance of the purchase price was refunded to the appellant on the same date without prejudice to the appellant's right pursuant to the contract. It must be observed here that by virtue of cl 9 of the agreement, time was of the essence.

The appellant waited two and a half years to see if the registration could be effected and the writ leading to this appeal was filed on 13 January 1982. Learned counsel for the appellant clarified that the delay in filing of the writ was because of the ongoing correspondence between the parties between the 2 October 1979 to 20 May 1981.

Essentially, the prayers in the writ were an application for specific performance and damages for breach of contract or damages in lieu of specific performance and for a declaration that the appellant was entitled to a lien on the properties for its deposit. According to the appellant, the first respondent was wound up on 4 February 1985 but they were not informed. Only on 30 January 1992 did the appellant obtain leave to proceed against the first respondent.

On 23 February 1987, the respondents wrote the following letter:

23 February 1987

M/s Presgrave & Matthews
Advocates & Solicitors
Standard Chartered Bank Chambers
2 Beach Street
PO Box 81
Penang

Dear Sirs

Motorcycle Industries (M) Sdn Bhd
Sale of lands held under Pegangan No 536, 537 and 538 Bandar Jelutong
Penang High Court Suit No 29 of 1982

We refer to the above matter and to the writ of summons and statement of Claim in this civil suit filed by your client.

The main claim in this civil suit is that the plaintiff prays for specific performance of the contract entered into between the plaintiff and the Receivers and Managers of Motorcycle Industries (M) Sdn Bhd. In light of the said claim we have now obtained a court order allowing the receivers and managers to proceed with the sale and to execute the memorandum of transfer.

In the circumstances could you kindly on behalf of your client forward us the balance purchase price of $459,000 and upon receipt of same, we on behalf of our client will obtain a memorandum of transfer duly executed by the vendors for your further action and registration.

As the same is a long outstanding matter, we hope you will give same your urgent attention and revert to us accordingly with the balance purchase price.

Thanking you.

Yours faithfully,
(Sgd)
cc: clients (Ref: Rec.ks.lts)

Learned counsel for the appellant explained that they did not respond because they felt that the suit spoke for itself and it was too late for the respondents to complete the sale and purchase and blame the appellant for

not being ready and willing to pay the balance. They relied on *Ganam d/o Rajamany v Somoo s/o Sinnah* [1984] 2 MLJ 290 where the Federal Court held that it is not sufficient for a purchaser to prove that he had at all times been ready and willing to complete the sale; he must also prove that he had performed or had been at all times ready and willing to perform his part of the contract or his part of the obligations of the contract as fixed or interpreted by the court. Since the respondent was unable to bring his case under this principle, the learned judicial commissioner was wrong to decree an order that the contracts be specifically performed.

Leading counsel for the respondents argued that the failure to complete the sale was not the fault of the respondents but the fault of the directors of the first respondent which was beyond their control. He pointed out that the last date of the correspondence between the parties was 20 May 1981 but the suit was filed only on 13 January 1982. This showed that there was some delay in the filing of the action.

On 23 February 1987, the appellant was asked to complete the sale as the respondents had obtained the necessary court order as follows:

In the High Court of Malaya at Kuala Lumpur
(Commercial Division)
C-31-175-86

In the matter of Motorcycle Industries (M) Sdn Bhd

and

In the matter of the Companies Act 1965

Between

Cyril Elphege Gomez ... Applicant

and

Official Receiver, Malaysia ... Respondent

Before the Honourable Mr Justice Gunn Chit Tuan

This 25 day of November 1986 In Chambers

ORDER

UPON the application of the Applicant abovenamed AND UPON READING the Originating Summons dated 1 July 1986, the Affidavit of Cyril Elphege Gomez affirmed on 1 July 1986 both filed herein AND UPON HEARING Miss Jyotsana Doshi of Counsel for the applicant abovenamed and Puan Soraya on behalf of the Official Receiver, Malaysia IT IS ORDERED that the applicant as receiver and manager of Motorcycle Industries (M) Sdn Bhd be and is hereby authorised to complete the sale of all that piece of land held under Pegangan No 536, 537 and 538, Bandar Jelutong, Seksyen 1, Daerah Timur Laut, Pulau Pinang together with the buildings erected thereon to Mastiara Sdn Bhd pursuant to the agreement dated 15 June 1979 AND IT IS ORDERED that the Official Receiver, Malaysia be and is hereby authorised to execute the memorandum of transfer over the land held under Pegangan No 536, 537 and 538, Bandar Jelutong,

Seksyen 1, Daerah Timur Lot, Pulau Pinang for and on behalf of Motorcycle Industries (M) Sdn Bhd together with the buildings erected thereon in favour of Mastiara Sdn Bhd AND IT IS LASTLY ORDERED that the costs of this application be paid from the proceeds of sale of the said lands.

Dated the 25 day of November 1986.

Sgd

.....
Senior Assistant Registrar,
High Court, Kuala Lumpur

This order is filed by M/s Tunku Zuhri, Manan & Abdullah, Solicitors for the Applicant herein whose address for service is at 31st Floor, Menara Tun Razak, Jalan Raja Laut, Kuala Lumpur.

(Ref: JD/12709/82/RN).

The respondents were ready to give specific performance on 23 February 1987 and the appellant could have completed the sale and continue with the claim for damages for late delivery. They, however, chose not to respond to the demand. This may be, according to leading learned counsel for the respondents, that they wanted the properties in 1979 and prices had dropped in 1987 because of the recession which started in 1986. However, in 1989 they changed their minds.

On 3 April 1987, the respondents wrote the following letter:

3 April 1987

AR Registered

M/S Presgrave & Matthews
Advocates & Solicitors
Standard Chartered Bank Chambers
2 Beach Street
10300 Penang

Dear Sirs,

Motorcycle Industries (M) Sdn Bhd
Sale of lands held under Pegangan No 536, 537 and 538 Bandar Jelutong Penang
High Court Suit No 29 of 1982

We refer to the above matter and to our letter dated 23 February 1987 and regret to note that to date there has been no reply whatsoever to same.

In the circumstances we have our client's instructions to request a reply within seven (7) days from the date of receipt hereof, failing which our client will take such steps as are necessary to forfeit the deposit and terminate the agreement forthwith. The said forfeiture and termination will be without prejudice to our client's rights and/or recourse to any other legal remedies pursuant to the sale and purchase agreement.

Yours faithfully

(Sgd)
cc: clients (Ref: REC.KS.lts)

The learned trial judge had stated in his judgment as follows: A

> In this case ten years had passed from the date the receivers and managers requested the plaintiffs to pay the balance purchase price, the plaintiffs had not even given any response nor pay the amount. All that the plaintiffs did was to obtain an ex-parte injunction to prevent the sale to the second purchasers.
>
> If the plaintiffs were all the time ready and willing to complete the sale all they could have done was to pay the balance purchase price which they were B asked to pay. At the very least they could have responded to ask for a reasonable time to be fixed to make the payment. They did neither.
>
> In the circumstances, I am of the view that this is not a case in which the court should exercise its discretion to grant a decree of specific performance.
>
> The plaintiffs also claimed: 'further or alternatively damages for breach C of contract'.
>
> On the facts of this case I do not think that the first defendant was in breach of the contract. During the first period, the receivers and managers had done all they could to have the memorandum of transfer executed but failed. The plaintiffs did not then file this action yet. Instead the plaintiffs requested for the balance purchase to be returned which was returned. When the D receivers and managers finally were in a position to complete the transaction and requested the plaintiffs to pay the balance purchase price, there was no response from the plaintiffs until now. The defendant had made it very clear in their letter dated 3 April 1987 that they would forfeit the deposit and terminate the agreement if they did not receive a reply. No reply came from the plaintiffs either within the stipulated time or at any time thereafter. In the E circumstances, it would not be correct to say that the defendant had breached the contract.
>
> The plaintiffs also claimed, 'in the alternative damages for breach of contract.'
>
> This remedy is applicable where a plaintiff having succeeded in his case, but for some reason, for example where the land is already registered in the F name of bona fide purchaser and is therefore unable to be transferred to the plaintiff, in such a case the court may order that damages be paid in lieu of specific performance. That is not the case here. The plaintiffs fail in their claim because they have failed to perform their part of the contract. Therefore the question of damages in lieu of specific performance does not arise.
>
> Prayer (iv), lien on the said properties, is a non issue in view of my G judgment on the other prayers.
>
> Lastly, concerning the deposit. The plaintiff did claim for the refund of the deposit in case their claim fail. Further, as I have mentioned, the defendant had made it very clear in their solicitors letter dated 3 April 1987 that they would forfeit the deposit if they received no reply from the plaintiff. In the circumstances I think that the defendant is entitled to forfeit the H deposit.

It was our unanimous finding that in these circumstances, the appellant was at fault for not responding to the respondents' letters dated 23 February 1987 and 3 April 1987 and it was quite right for the learned trial judge to dismiss the claims and to forfeit the deposit. We, therefore, dismiss the I appeal with costs. The deposit is to go to the respondents to account for their taxed costs.

Appeal dismissed with costs.

Reported by Zahid Taib